

Office of Chief Counsel
Internal Revenue Service

memorandum

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date: January 7, 2000

to: Chief, Quality Measurement Staff, Upstate New York District
QMS, Room 306

from: District Counsel, Buffalo

subject: Interest Netting Per I.R.C. § 6621(d),
RRA '98, Netting Between Two EINs

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

DISCUSSION

This is in response to a request for our opinion on whether interest netting is permissible between two corporations with different EIN numbers if the return filed under one EIN number is determined to be invalid.

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FACTS

[REDACTED], a member of a consolidated group, filed separate 1120 DISC returns for the years [REDACTED], [REDACTED] and [REDACTED]. Upon examination of that return, the agent determined that the DISC returns were invalid. The RAR abated all taxable income from the DISC returns and added the same income for the 1120 return of [REDACTED]. The final result determined over-assessments to [REDACTED] and deficiencies to [REDACTED]. Final adjustments were agreed in Appeals and was subjected to Joint Committee review.

All case files were sent to the Upstate New York District, ESP Unit, for processing. The file enclosed a spreadsheet of adjustments dated [REDACTED], which calculated interest on all years of [REDACTED] and [REDACTED], netted all amounts, which resulted in a balance due of \$ [REDACTED] as of [REDACTED], from [REDACTED]. The taxpayer paid the amount on [REDACTED], and the Appeals Office posted said payment.

At closing, the ESP Unit recalculated the interest. Restricted interest per I.R.C. § 6601(d) was not computed on the correct general tax adjustment in the prior calculation. The calculation by ESP on the [REDACTED], [REDACTED] and [REDACTED] deficiencies was substantially higher than the [REDACTED], summary. The computations by ESP were dated [REDACTED]. As a result, although all credits from [REDACTED] were applied to [REDACTED] on [REDACTED], [REDACTED] was underpaid.

After assessment the taxpayer filed an informal claim requesting credits from [REDACTED] be reapplied at their availability dated per I.R.C. § 6402. This action would reduce the deficiency interest charged on [REDACTED]'s Forms 1120.

On July 7, 1997, the Office of Chief Counsel provided guidance which concluded that an overpayment may not be credited against a deficiency that has been prepaid by an advance payment. Section 6402(a) permits the Service to credit an overpayment only against an outstanding liability for tax.

In the present situation, the payment posted on [REDACTED], would normally prevent offsets before that date. Calculations provided to us indicate that if all interest, (including the restricted interest) had been properly computed the taxpayer would have owed an additional amount of \$ [REDACTED]. As a result of the correct computations not being completed until [REDACTED], for the years [REDACTED] and [REDACTED], the additional liability was \$ [REDACTED]. In lieu of Section 6402, the taxpayer requests interest rate netting to equalize the interest rate on

the [REDACTED] overpayment, and the interest charged on [REDACTED] deficiencies. Basically, the taxpayer wishes an exception to the same taxpayer rule governing netting.

Under I.R.C. § 6402(a), the Service can credit an overpayment as long as the person who made the overpayment is also liable for a tax against which the overpayment is to be credited. Generally, a member of a consolidated group is severally liable for the income tax liability of the group. The Service has the authority to collect the full amount of the unpaid tax from any of the liable taxpayers when a tax is jointly and severally owed by two or more taxpayers. Additionally, pursuant to I.R.C. § 6402(a) and Treas. Reg. § 301.6402-1, the Service may credit the overpayments attributed to one corporation against the outstanding consolidated return tax liability. Any interest attributable to the underpayment of the consolidated return tax liability will be computed subject to the provisions of I.R.C. § 6601(f). I.R.C. § 6601(f) provides that if any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under Section 6601 on the portion of the tax so satisfied for any period during which, had the credit not been made, interest would have been allowable with respect to such overpayment.

The RRA '98 legislative history of Section 6621(d) states in part:

...it is anticipated that the Secretary will take into account interest paid on previously determined deficiencies or refunds for the purpose of determining the rate of interest under this provision without regard to whether the underpayments or overpayments are currently outstanding. It is also anticipated that where interest is both payable from and allowable to an individual taxpayer for the same period, the Secretary will take all reasonable efforts to offset the liabilities rather than process them separately using the net interest rate of zero.

H.R.Conf. Rep. No. 599, 105th Cong. 2nd Session, 257 (1998).

We believe that netting is permissible in this instance, since the Service's determination was that [REDACTED] should not have filed a DISC return and that [REDACTED] was the proper corporation to report the taxable income previously reported by [REDACTED]. In effect, the Service made a determination that [REDACTED] is the corporation liable for the taxes and the fact that these corporations have different EINs should not preclude interest netting per I.R.C. § 6621(d).

Although the IRS Restructuring and Reform Act of 1998 dealing with global interest netting did not mention the specific situation when underpayments and overpayment are not outstanding, we believe that the intent of the Act was that the IRS would take into account interest paid on previously determined deficiencies and refunds regardless of whether the underpayments or overpayments are currently outstanding.

Given the lack of regulations, case law and Treasury Rulings on this Section and issue, we are forwarding a copy of this opinion to our National Office for post-review. If, as a result of that post-review, there are any changes to our conclusions, we will apprise you of those changes.

If you have any questions regarding this matter, please contact Jerome F. Warner of our office at 551-5610.

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